No. 84-755

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether respondent, who was reasonably suspected of attempting to smuggle contraband drugs carried within her body and who refused to submit to an X-ray, could lawfully be detained at the border by Customs officers for the period of time necessary to examine her bodily wastes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 731 F.2d 1369. The district court's oral ruling denying respondent's suppression motion (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A petition for rehearing was denied on August 10, 1984 (Pet. App. 15a). On October 3, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 8, 1984. The petition was filed on that date and was granted on January 21, 1985. J.A. 66. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Central District of California, respondent was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and unlawful importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1). She was sentenced to concurrent terms of two years' imprisonment to be followed by a three-year special parole term. A divided panel of the court of appeals reversed respondent's convictions (Pet. App. 1a-12a).

1. This case involves an instance of alimentary canal smuggling, a technique used with increasing frequency to smuggle narcotics into this country. A typical alimentary canal smuggler is a non-American who is hired to carry narcotics into the United States in his or her digestive tract. While in the foreign country, the smuggler first takes laxatives to empty his digestive system. He then swallows balloons or capsules containing cocaine or another illegal drug, and takes a substance that inhibits the functioning of his digestive system. After the smuggler enters the United States, he ingests laxatives and excretes the balloons containing the narcotics. See Pet. App. 10a (Jameson, J., dissenting); *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1350 (11th Cir. 1984), petition for cert. pending, No. 84-5553; *United States* v. *Mejia*, 720 F.2d 1378, 1380 n.1 (5th Cir. 1983); *United States* v. *Couch*, 688 F.2d 599, 605 (9th Cir. 1982).

2. The evidence, which is summarized in the opinion of the court of appeals (Pet. App. 2a-4a), showed that shortly after midnight on March 5, 1983, respondent arrived at the Los Angeles airport on a flight from Bogota, Colombia. After passing through an immigration checkpoint, she proceeded to a Customs inspection area where, following a review of her travel documents, she was directed to a secondary inspection area for a more thorough examination. *Id.* at 2a; J.A. 62.

Customs Inspector Jose Serrato reviewed respondent's passport, inspected her luggage, and questioned her about her trip to the United States. Examination of her travel documents revealed that respondent was from Colombia, a source country for narcotics, was on a trip of short duration, and carried approximately $5,000 in American currency. In addition, respondent previously had made many short trips to the United States, sometimes to Miami and sometimes to Los Angeles. Upon questioning, respondent, who spoke no English, revealed that she had no confirmed hotel reservations and no family or friends in the United States. She could not recall where she had purchased her airline ticket. Pet. App. 2a n.3; J.A. 41-42, 46, 62; E.R. 40.[1]

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[1] E.R. refers to the excerpt of record filed in the court of appeals.

A few of these facts are contained only in the statements of the Customs officers that were attached to the application for a court order authorizing an X-ray and body cavity search

Respondent asserted that she had come to the United States to purchase clothing and appliances for her husband's retail business in Colombia and displayed business cards and a book of invoices to substantiate this claim. J.A. 14-15. She explained that she planned to take a taxi to various retail stores to purchase the merchandise on the spot. J.A. 62; E.R. 40. Serrato noticed that although respondent had $5,000 in cash she carried no billfold. Moreover, she had no shoes except the spiked high heels that she was wearing, and she carried little extra clothing.[2] After consulting with another Customs officer, Ser-

(see pages 6-7, *infra*). Those statements were included as attachments to respondent's motion to suppress, and therefore were before the district court in connection with its consideration of that motion. Although respondent lodged an objection on hearsay grounds to the district court's consideration of some of these facts (J.A. 11), both the district court and the court of appeals appear to have relied upon the statements in assessing whether the officers were justified in detaining respondent (see J.A. 10-11; Pet. App. 2a n.3). Of course, the Federal Rules of Evidence, including the hearsay rule, do not apply to suppression hearings. Fed. R. Evid. 1101(d)(1); see, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 174 (1974); *United States* v. *Merritt*, 695 F.2d 1263, 1269-1270 (10th Cir. 1982), cert. denied, 461 U.S. 916 (1983). The reliance upon this evidence by the courts below therefore was perfectly proper.

[2] During the suppression hearing, the parties stipulated that respondent's purse contained the following items: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, and eye shadow; perfume; hand cream; toothbrush; toothpaste; hairbrush; handkerchief; pictures of two children; a pen; and some U.S. currency. Her suitcase contained a nightgown, a 500-peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted underwear and socks, two sweaters, and a brown skirt. J.A. 9.

rato concluded that respondent probably was carrying drugs internally because she exhibited characteristics that, in the experience of Customs inspectors, are common to persons who smuggle drugs in their alimentary canals. Pet. App. 2a n.3; J.A. 46, 62.

Serrato then arranged for a female Customs officer to conduct a patdown search of respondent. After escorting respondent to a search room, the female officer conducted the search and discovered a firmness in respondent's pelvic area. After directing respondent to unzip her pants, she observed that respondent was wearing two pairs of elastic underpants and had placed a paper towel in her crotch area. No contraband was discovered during this procedure. J.A. 57, 62-63. The Customs officers then asked respondent whether she would consent to an X-ray and, although she claimed she was pregnant, she initially gave her consent. Respondent withdrew her consent, however, when informed that she would be handcuffed while being transported to the hospital for the X-ray. Pet. App. 3a; J.A. 47, 63.

The officers on duty at the airport then requested that Customs Special Agent Kyle E. Windes seek a court order for an abdominal X-ray. Windes declined to do so and instead directed that respondent be afforded the options of consenting to an X-ray, remaining in custody until she had a bowel movement, or returning to Colombia on the next available flight.[3] Pet. App. 3a; J.A. 39, 48, 63. Given these choices, respondent opted to return to Colombia. The officers

[3] At this time the Ninth Circuit already had decided *United States* v. *Ek*, 676 F.2d 379 (1982), in which it stated that more than reasonable suspicion is required to justify a nonconsensual X-ray.

advised her that she would be kept under observation until her departure and that she would be arrested if she excreted any narcotics during that period. J.A. 48, 63.

Respondent was detained in a room at the airport while she waited to be placed on a return flight to Colombia.[4] Under the continuous observation of Customs officers, respondent remained in the room throughout the night and most of the next day, refusing to eat, drink, or empty her bowels. For most of this period, respondent sat curled up in a chair, leaning to one side. Pet. App. 3a-4a; J.A. 48, 49-50, 52-53, 58, 64.

At approximately 3:00 p.m. on March 5, female officers subjected respondent to a second search, which again failed to reveal evidence of contraband (Pet. App. 3a; J.A. 50, 64). One hour later, Agent Windes arrived at the airport and, after consulting with the Customs officers on the scene and with an Assistant United States Attorney, decided to seek a court order authorizing a pregnancy test, an X-ray, and an internal body cavity search. Agent Windes's affidavit in support of the court order summarized the Customs officers' observations of respondent, including her refusal of food and drink and failure to use toilet facili-

[4] As it happened, the next direct flight to Colombia was many hours away (J.A. 19, 48). During the course of respondent's subsequent detention, however, Customs officers attempted to arrange for her departure to Mexico City, where it was believed she could catch a connecting flight to Colombia. These arrangements were thwarted by poor weather conditions and by the discovery that respondent did not have a visa for Mexico and thus could not wait there until the next connecting flight to Colombia. J.A. 53-54, 55-56, 58, 63-64.

ties for a 16-hour period. J.A. 40-43, 64.[5] At approximately midnight, a federal magistrate issued an order authorizing an X-ray of respondent's abdominal area and a body cavity search. The order provided that the X-ray and body cavity searches were to be conducted "only after the doctor has considered [respondent's] claim that she is pregnant." Pet. App. 3a-4a; J.A. 40, 44-45, 64.

At 12:30 a.m. on March 6, 1983, respondent was taken to the University of Southern California Medical Center, where a test showed that she was not pregnant. A rectal examination revealed a balloon containing cocaine. Respondent was then placed under arrest and taken to a room in the prison ward of the hospital. Over the next four days, she excreted 88 balloons containing more than half a kilogram of cocaine. Pet. App. 4a; J.A. 50-51, 64-65.

2. Prior to trial, respondent moved to suppress the cocaine (E.R. 15-27). She argued, inter alia, that the affidavit supporting the court order for the body cavity search was tainted by information obtained during an unlawful detention (E.R. 20-23).

The district court denied the motion (Pet. App. 13a-14a). The court acknowledged that, because the court order was based on information gleaned during the course of respondent's detention, the validity of the court order turned on the validity of the detention (*id.* at 14a). The court pointed out that after the Customs officers initially questioned respondent, they had "a very substantial suspicion" that she was smuggling narcotics concealed inside her body (*ibid.*;

[5] The affidavit also noted that respondent's "relative lack of toilet articles, her light luggage, and her money being in $50 bills indicate a 'stripped down' or 'clean' approach typical of professional couriers" (J.A. 42).

J.A. 10-11). The court concluded that the officers therefore were justified in seeking respondent's consent to an X-ray examination and, upon her refusal to consent, in detaining her until she either could be placed aboard a return flight to Colombia or had a bowel movement that would confirm or negate the officers' suspicions (Pet. App. 14a).

3. A divided panel of the court of appeals reversed (Pet. App. 1a-12a). The court did not question the sufficiency of the information supporting the court order authorizing the search of respondent's body cavity. It held, however, that the information underlying the court order, which included observations of respondent's suspicious behavior while detained, was the fruit of an unlawful detention of respondent, and that the cocaine therefore should have been suppressed.

The majority acknowledged that the Customs officers "had limited options in the face of their strong belief that [respondent] was a drug courier. They could let her into the country and try to follow her; they could seek a court order for an X-ray without undue delay; or they could detain her until nature took its course" (Pet. App. 6a). In concluding that the officers' choice of the latter option was unreasonable, the majority found that at the time the officers decided to detain respondent they lacked the level of suspicion necessary to obtain a court order for an X-ray search under the Ninth Circuit's recent decision in *United States* v. *Quintero-Castro*, 705 F.2d 1099 (1983)—a "clear indication" that respondent was engaged in alimentary canal smuggling (Pet. App. 6a). In these circumstances, the majority reasoned, the facts known to the officers likewise did not justify the period of detention, which the court characterized as involving "many hours of humiliating discomfort," for the purpose of examining respondent's bowel movements (*id.* at 5a-6a).

Judge Jameson dissented (Pet. App. 8a-12a). He noted that even though respondent "may have suffered 'many hours of humiliating discomfort,' she was herself solely responsible for a considerable part of it" (*id.* at 9a). Judge Jameson concluded that he "would permit reasonable detentions at the border for the purpose of observing persons suspected of alimentary canal smuggling so long as the detention is based on a real suspicion sufficient to justify a strip search" (*id.* at 11a).

In the view of the dissent, the detention here, although lengthy, was less intrusive than either a body cavity or an X-ray search, as to which the Ninth Circuit had imposed the more rigorous "clear indication" standard. Addressing the reasonableness of detaining persons reasonably suspected of smuggling narcotics in their bodies, Judge Jameson observed that "indications of alimentary canal smuggling can only be observed *over a period of time*. Allowing a reasonable period of detention, based on a real suspicion, is the least intrusive and most reliable means of identifying alimentary canal smugglers." Pet. App. 10a-11a (emphasis in original; footnote omitted).[6] Finally, he observed that "[t]o deny the va-

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[6] Judge Jameson stated "[a]s a practical matter * * * a detention would not be necessary if customs officials could seek a court order for an X-ray on the basis of a 'real suspicion'" (Pet. App. 11a n. 3). He noted, however, that the court of appeals had "adopted the higher 'clear indication' standard for X-ray searches" and that, although "the wisdom of this decision may be questioned, * * * it is the law of the circuit" (*ibid.*).

lidity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders" (*id.* at 12a).

SUMMARY OF ARGUMENT

This Court has consistently recognized that searches and seizures conducted at the border have a special status under the Fourth Amendment. For example, a search of the luggage of a traveler seeking to enter the United States is permissible on the basis of nothing more than the Customs officer's subjective suspicion that something is amiss. After the traveler has entered the country, a search of that type generally would be proper only if justified by probable cause. The government's compelling interest in protecting the territorial integrity of the nation against the unlawful entry of persons and contraband, and the substantially limited privacy and liberty interests of persons seeking admission into the country, especially aliens such as respondent, mandate the application of a relaxed standard of reasonableness in assessing government action in the border context.

This case presents the question of the application of this reasonableness standard to the detention at the border of persons who are reasonably suspected of attempting to enter the country with illegal narcotics concealed in their stomachs. Customs officers can confirm or dispel a suspicion that someone is engaged in this type of smuggling only by subjecting the suspect to an X-ray search or detaining him until his natural processes reveal the contents of his digestive tract. It is our contention that a Customs officer may detain a person for this purpose if the officer has formed a

reasonable suspicion, based upon objective, articulable facts, that the suspect is carrying contraband.

When a suspect is detained at the border to enable Customs officers to conduct a search, the propriety of the detention should turn on the lawfulness of the search that necessitates the detention. The detention of a suspected alimentary canal smuggler therefore is proper if the Customs officers may lawfully search the suspect's bowel movements. The intrusion upon the suspect's privacy interests resulting from a search of this type certainly is no greater than the indignity accompanying a strip search. The courts of appeals are in general agreement that a strip search is proper if a Customs officer has a reasonable suspicion that the suspect is carrying contraband, and the same rule should apply in this context. In order to search a suspect's bowel movements, it is of course necessary to detain the suspect until he moves his bowels. This circumstance does not support a requirement of a higher quantum of suspicion, however, because the length of the detention is almost entirely within the suspect's control. And, of course, an individual who finds such a detention and search particularly offensive always has the ability to avoid the detention and search by consenting to an X-ray.

The court below concluded that the detention of a suspected alimentary canal smuggler is lawful only if the facts available to the Customs officer satisfy a more stringent test—if they provide a "clear indication" that the suspect is an alimentary canal smuggler. That rule is incompatible with the relaxed reasonableness standard that applies in the border context. Moreover, it would prevent Customs officers from detaining persons about whom, in the court of appeals' own words, there is a "justifiably high level

of official skepticism" (Pet. App. 5a). The government should be free to utilize reasonable investigative techniques, such as the detention in this case, in order to apprehend persons attempting to smuggle illegal drugs across our national borders. This is especially so in the case of aliens, such as respondent, who have substantially reduced expectations of privacy and liberty when seeking admission into this country. Since a detention at the border of the type at issue here does not infringe upon these limited expectations, it does not violate the Fourth Amendment.

The facts available to the Customs officers in the present case, which are characteristic of alimentary canal smuggling efforts, were more than ample to support a reasonable suspicion that respondent was engaged in smuggling. Respondent arrived from Colombia, a key source country for narcotics, and previously had made many short trips to the United States. She had no friends or relatives in the United States, no hotel reservations, and did not know where her ticket had been obtained. Respondent claimed that she was planning to purchase supplies for a retail store but had no concrete plans other than her intention to get to the stores by traveling around in a taxi. Moreover, when subjected to a strip search, respondent was found to have an unusual arrangement of undergarments suggestive of alimentary canal smuggling. The Customs officers properly recognized these facts as substantial indicia of alimentary canal smuggling. They therefore were justified in detaining respondent in order to verify or dispel the suspicion that she was engaged in such smuggling.

ARGUMENT

THE DETENTION AND SEARCH OF RESPONDENT AT THE BORDER DID NOT VIOLATE THE FOURTH AMENDMENT

The issue in this case is whether a person who is reasonably suspected of carrying illegal drugs in her alimentary canal, and who refuses to consent to an X-ray, may be detained at the border for the time necessary to verify or dispel that suspicion by examining her body wastes. A detention for this purpose falls within the broad statutory authority of Customs officers to detain and search persons seeking to enter the country in order to prevent the importation of contraband. See 19 U.S.C. 482, 1467, 1581, 1582; 19 C.F.R. 162.6, 162.7; see also page 15 note 7, *infra*. In our view, it is similarly clear that such a detention is reasonable under the Fourth Amendment standard governing searches and seizures at the border.

A. The Government May Detain At The Border A Person Reasonably Suspected Of Alimentary Canal Smuggling For The Time Necessary To Verify Or Dispel That Suspicion

1. The inquiry in assessing a search or seizure under the Fourth Amendment focuses upon "the 'reasonableness' of the type of government intrusion involved." *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 9; see also *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 10; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 6-7; *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). Viewed from a different perspective, the inquiry considers the extent to which society recognizes and affords the individual a privacy or liberty interest in the particular circumstances in which the

government action occurs. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5; *Smith* v. *Maryland*, 442 U.S. 735, 739-741 (1979); *United States* v. *Miller*, 425 U.S. 435, 442 (1976); *Katz* v. *United States*, 389 U.S. 347 (1967). As the Court explained in *New Jersey* v. *T.L.O.*, slip op. 10 (citation omitted):

> [W]hat is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails."

The reasonableness of many types of searches and seizures is measured by the standard of probable cause, but the Court has found that in some circumstances the balancing of relevant factors mandates the use of a relaxed standard for determining reasonableness. See, *e.g.*, *New Jersey* v. *T.L.O.*, slip op. 14; *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Michigan* v. *Summers*, 452 U.S. 692 (1981); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *Terry* v. *Ohio*, *supra*.

It is axiomatic that such a relaxed reasonableness standard applies to searches and seizures at the border. The government has a uniquely important interest in stopping and searching persons at the border in order to prevent the entry into this country of unauthorized persons and goods. This interest stems from the inherent authority of a sovereign to protect its territorial integrity and is reflected in the power granted Congress "[t]o regulate Commerce with foreign Nations * * *" (Art. I, § 8, Cl. 3). Congress has sought to prevent the importation of contraband by granting Customs officers broad authority to stop and

search persons attempting to enter the country.[7] See *Torres* v. *Puerto Rico*, 442 U.S. 465, 472-473 (1979); *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125-126 (1973); *Carroll* v. *United States*, 267 U.S. 132, 154 (1925).

In *United States* v. *Ramsey*, the Court approved the opening of a letter found to contain heroin that was mailed from a foreign country, although the Customs inspector had not obtained a warrant and did not have probable cause to believe that the letter contained contraband. The Court held (431 U.S. at 619 (footnote omitted)):

> Border searches * * * from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence

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[7] Several statutes authorize detentions and searches of persons at the border. See 19 U.S.C. 482, 1467, 1581, 1582. For example, Section 1582 provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

Section 1582 has been implemented by regulations broadly authorizing stops and searches of persons seeking to enter the United States. See 19 C.F.R. 162.6, 162.7. The use of this authority by Customs officers is governed by mandatory guidelines issued by the Commissioner of Customs.

> of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.

Ramsey's conclusion that the probable cause standard and the requirement of a warrant do not govern the reasonableness of searches at the border applies to searches and detentions of persons. See 431 U.S. at 616. As the Court observed in *Carroll* v. *United States*, 267 U.S. at 154, persons lawfully within the country "have a right to free passage without interruption or search unless there is * * * probable cause," but "[t]ravellers may be * * * stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." See also *Torres* v. *Puerto Rico*, 442 U.S. at 472-473; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (Rehnquist, J., concurring); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 62-63 (1974); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *id.* at 288 (White, J., dissenting); cf. *United States* v. *Martinez-Fuerte*, *supra*.

In order to evaluate the propriety of searches and detentions of persons at the border, it is necessary to balance "the individual's legitimate expectations of privacy and personal security" against the government's compelling interest in effectively policing our national borders.[8] Cf. *New Jersey* v. *T.L.O.*, slip op.

[8] This already substantial government interest is heightened in the circumstances of this case because " '[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit.' " *United States* v. *Place*,

10; see also *United States* v. *Hensley*, No. 83-1330 (Jan. 8, 1985), slip op. 6; *United States* v. *Place*, slip op. 6-8; *United States* v. *Martinez-Fuerte*, 428 U.S. at 555; *United States* v. *Brignoni-Ponce*, 422 U.S. at 878; *Terry* v. *Ohio*, 392 U.S. at 22.

2. This case concerns the application of this balancing test to assess the reasonableness of the detention at the border of a suspected alimentary canal smuggler. A Customs officer can confirm or dispel a suspicion that a person is concealing drugs in his alimentary canal only by obtaining an X-ray of the suspect's abdomen or detaining the suspect in order to examine his bowel movements.[9]

slip op. 7 (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring)).

[9] The court below suggested that Customs officers could "let [suspected smugglers] into the country and try to follow [them]" (Pet. App. 6a). That approach would amount to an abrogation of the very purpose of Customs inspections—to *prevent* contraband from entering the United States. Moreover, such a course of action would be extremely impractical. Once the suspected smuggler is allowed to proceed on his or her own way, an investigation would ordinarily have to comply with the stricter standards applicable away from the border, thereby making detection more difficult (but cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983)). In any event, an alimentary canal smuggler is likely to excrete the drug-filled containers in a hotel room or some other private place. Since government agents almost certainly would not be able to view this activity, they would not be able to gain additional information casting suspicion upon the smuggler. Thus, the smuggler probably would be able successfully to transfer the drugs (also out of public view) to his domestic confederates.

Permitting a suspected smuggler to return to his country of origin also is an unsatisfactory alternative because it would allow the suspect to escape apprehension and return to repeat

The courts of appeals have applied different rules in assessing the reasonableness under the Fourth Amendment of the use of these procedures. The Ninth Circuit has concluded that X-ray searches are the equivalent of searches of a suspect's body cavities and therefore can be conducted only if there is a "clear indication" that the suspect is an alimentary canal smuggler—the test it had previously established for border body cavity searches. See *United States* v. *Quintero-Castro*, 705 F.2d 1099 (9th Cir. 1983).[10] The practical impact of that decision on law enforcement efforts to detect and prevent the entry of contraband into the country was not great so long as the alternative of detention remained available where, as here, consent to an X-ray was not given. In the present case, however, the Ninth Circuit has held that the same standard governs the detention of suspected alimentary canal smugglers in order to examine their bowel movements. Pet. App. 6a.

The Fifth and Eleventh Circuits, by contrast, have held that an X-ray search is permissible if the Customs officer has a "reasonable suspicion" that the suspect is engaged in smuggling activity, a less stringent test than the Ninth Circuit rule. *United States* v.

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his smuggling efforts another day. In addition, this approach would remove a disincentive to smuggling activity by materially reducing the risk of apprehension and prosecution.

[10] See also *United States* v. *Castrillon*, 716 F.2d 1279, 1282 (9th Cir. 1983); *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983); *United States* v. *Couch*, 688 F.2d 599, 604-605 (9th Cir. 1982); *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982); *United States* v. *Aman*, 624 F.2d 911, 912-913 (9th Cir. 1980). One Ninth Circuit panel has questioned the wisdom of this decision (*United States* v. *Shreve*, 697 F.2d 873 (1983)).

Vega-Barvo, 729 F.2d 1341, 1346-1350 (11th Cir. 1984), petition for cert. pending, No. 84-5553; *United States* v. *Mejia*, 720 F.2d 1378, 1381-1382 (5th Cir. 1983).[11] The Eleventh Circuit has applied the same standard to the detention of a suspect in order to examine his bowel movements. It held that when a Customs officer reasonably suspects that a person is a drug smuggler, "[t]he detention of [the suspect] at the border long enough to reveal by natural processes that which would be disclosed by a more expeditious x-ray search cannot be held to be an unreasonable seizure. Nor can the search of the results of that natural process be held to be an unreasonable search." *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352, 1357 (11th Cir. 1984).[12] In our view, the Eleventh Circuit rule properly accommodates the interests of the government and the interests of travelers with respect to both X-ray searches and detentions of the type at issue in this case.[13]

a. As we have discussed (see pages 14-17, *supra*), the propriety under the Fourth Amendment of the

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[11] See also *United States* v. *Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984); *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1363 (11th Cir. 1984), petition for cert. pending, No. 84-5556; *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984).

[12] Accord, *United States* v. *De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984); *United States* v. *Henao-Castano*, 729 F.2d 1364, 1366 (11th Cir. 1984), petition for cert. pending, No. 84-5554; *United States* v. *Solimini*, 560 F. Supp. 648, 653-654 (E.D.N.Y. 1983).

[13] We discuss the X-ray search issue in our brief in opposition in *Vega-Barvo* v. *United States*, petition for cert. pending, No. 84-5553, a copy of which has been provided to counsel for respondent.

detention of a person at the border is measured against a relaxed standard of reasonableness. This is a result not only of the government's compelling interest in regulating the entry of people and goods into the country, but also of travelers' reduced expectations of liberty in the border context. Since almost the beginning of the nation, statutes have authorized detentions at the border for the purpose of determining whether a person seeking to enter the country is carrying contraband. See, *e.g.*, Act of Mar. 9, 1815, ch. 94, § 2, 3 Stat. 232; see also page 15 note 7, *supra*. Persons seeking to enter the country are on notice that they may be detained at the border until it is established that they are entitled to enter. *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1356; see *United States* v. *King*, 517 F.2d 350, 353 (5th Cir. 1975), cert. denied, 446 U.S. 966 (1980); Barnett, *A Report On Search And Seizure At The Border*, Am. Crim. L. Q., Aug. 1963, at 36, 39-41; cf. *United States* v. *Martinez-Fuerte*, 428 U.S. at 561.

To determine the reasonableness of a detention under the Fourth Amendment it is necessary to balance the justification for the detention against the extent to which the detention infringes upon the individual's expectation of liberty. As the Eleventh Circuit has observed in this context, "[c]onsideration of the reasonableness of the length of detention must focus on the purpose of detention in the first place." *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1356; cf. *United States* v. *Place*, slip op. 10; *Michigan* v. *Summers*, 452 U.S. at 701-706; *Terry* v. *Ohio*, 392 U.S. at 19-20; 3 W. LaFave, *Search and Seizure* § 9.2, at 39-40 (1978).

Where the purpose of the detention is to conduct a border search that is reasonable under the Fourth

Amendment, it is reasonable for the government to detain the suspect for the time needed to conduct the search. *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1356; *United States* v. *Des Jardins*, No. 82-1247 (9th Cir. Sept. 21, 1984), slip op. 4150 n.9; *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 621-622 (9th Cir. 1980); cf. *United States* v. *Place*, slip op. 10; *Michigan* v. *Summers*, 452 U.S. at 701-706. The determination that a given quantum of suspicion permits the government to engage in a search would be meaningless if it did not carry with it the authority to detain the suspect in order to conduct the search.[14] This is especially true in the border setting because the purpose of the search is to *prevent* persons from entering the country with contraband. Moreover, in light of the reduced liberty expectations of persons seeking to cross the border, such a detention is much less intrusive than the detention of a person occurring inside the United States. The validity of the detention in this case therefore depends upon the reasonableness of the search contemplated by the Customs officers—the examination of respondent's bodily wastes.

b. The reasonableness of a search must be determined by balancing the government's interest in preventing the importation of contraband against the individual's expectations of "personal privacy and dignity" protected by the Fourth Amendment. *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). See pages 13-17, *supra*. In assessing the reasonableness of border searches, the courts of appeals have created two general categories. A "routine" search of a traveler's

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[14] The government's diligence in conducting the search may be a factor in assessing the reasonableness of the search. Cf. *United States* v. *Place*, slip op. 13.

belongings and outer garments has been held to be proper on the basis of nothing more than a Customs officer's subjective view that such a search is appropriate.[15] More intrusive searches, such as a strip search in which the suspect is told to remove his clothes and is subjected to a visual inspection, or a search by medical personnel of a suspect's body cavities, have been upheld only when the officer's suspicion is reasonably based upon objective facts. Most of the courts of appeals require that the officer possess a "reasonable suspicion" that contraband will be discovered in order to conduct these more intrusive searches.[16] The Ninth Circuit, however, has further divided these more intrusive searches into two categories: "real suspicion" is needed to permit a strip search,[17] and a

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[15] *United States* v. *Vega-Barvo*, 729 F.2d at 1345; *United States* v. *Grotke*, 702 F.2d 49, 51 (2d Cir. 1983); *United States* v. *Sandler*, 644 F.2d 1163, 1167-1169 (5th Cir. 1981) (en banc); *United States* v. *Asbury*, 586 F.2d 973, 975 (2d Cir. 1978); *United States* v. *Palmer*, 575 F.2d 721, 723 (9th Cir.), cert. denied, 439 U.S. 875 (1978); *United States* v. *Himmelwright*, 551 F.2d 991, 993-994 (5th Cir.), cert. denied, 434 U.S. 902 (1977).

[16] *United States* v. *Vega-Barvo*, 729 F.2d at 1345; *United States* v. *Pino*, 729 F.2d 1357, 1359-1360 (11th Cir. 1984); *United States* v. *De Gutierrez*, 667 F.2d 16, 19 (5th Cir. 1982); *United States* v. *Asbury*, 586 F.2d at 976; *United States* v. *Wardlaw*, 576 F.2d 932, 934 (1st Cir. 1978).

[17] *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970). The Ninth Circuit has defined "real suspicion" in this context as "subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law" (*ibid.*). This standard essentially is the equivalent of the reasonable suspicion test adopted by the other courts of appeals.

"clear indication" or "plain suggestion" that contraband is contained in the suspect's body is the prerequisite for a body cavity search.[18]

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[18] *Rivas* v. *United States*, 368 F.2d 703, 710-712 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). The Ninth Circuit has explained that " '[c]lear indication' means more than real suspicion but less than probable cause." *United States* v. *Mendez-Jimenez*, 709 F.2d at 1302.

This "clear indication" language was taken from this Court's decision in *Schmerber* v. *California*, 384 U.S. 757 (1966). In *Schmerber*, the defendant was arrested for driving under the influence of intoxicating liquor. At the direction of a police officer, a physician withdrew a blood sample from the defendant's body. The defendant asserted that the extraction of blood constituted an unlawful search and seizure. This Court held that while there "plainly" was probable cause to arrest the defendant, the extraction of blood could not be upheld as a search incident to arrest (384 U.S. at 768-769). It stated (*id.* at 769-770):

> The interests in human dignity and privacy which the Fourth Amendment protects forbid * * * [intrusions beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

The Court nevertheless upheld the blood test because the facts establishing probable cause to arrest "also suggested the required relevance and likely success" of the blood test (*id.* at 770).

Thus, *Schmerber* uses the "clear indication" standard to suggest that the kind of search there had to be supported by particularized probable cause, rather than to designate some intermediate level of suspicion between reasonable suspicion and probable cause as a standard for assessing certain searches. Whether or not it might be appropriate to adopt

We accept the appropriateness of applying the "reasonable suspicion" standard in measuring the permissibility of more intrusive border searches such as strip searches—at least as to citizens [19]—just as it has been applied by this Court in a variety of other contexts in which an objective showing short of probable cause is required to demonstrate the reasonableness of government action. *New Jersey* v. *T.L.O.*, slip op. 14-15; *Michigan* v. *Long*, *supra*; *Michigan* v. *Summers*, *supra*; *United States* v. *Brignoni-Ponce*, 422 U.S. at 881; *Terry* v. *Ohio*, 392 U.S. at 20-27. This standard presently is applied by most of the courts of appeals, and even the Ninth Circuit's "real suspicion" rule actually is equivalent to a "reasonable suspicion" test (see page 22 note 17, *supra*).

The search of a suspect's bodily wastes for the presence of balloons containing illegal narcotics involves an intrusion upon privacy interests no greater than that accompanying a strip search and therefore should be assessed under the reasonable suspicion standard. Assuming *arguendo* that some more stringent standard might apply to body cavity searches,[20]

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such an intermediate standard for some situations, *Schmerber* therefore provides no support for the rule adopted by the Ninth Circuit. See 3 W. LaFave, *Search and Seizure* § 10.5, at 286-287 (1978).

[19] Our principal argument does not distinguish between the detention at the border of returning citizens and aliens seeking to enter the United States. We argue below (see pages 34-37, *infra*) that the detention of an alien such as respondent is permissible even if the detention of a returning citizen in similar circumstances might be held to violate the Fourth Amendment.

[20] The reasonable suspicion standard, rather than the Ninth Circuit's "clear indication" test, also should apply to body cavity searches. This Court has not previously recognized an

we believe it is plain that the search of a suspect's bowel movements has none of the characteristics of a more intrusive body cavity search. The Ninth Circuit has differentiated between strip searches and body cavity searches by noting that body cavity searches result in an intrusion by the searcher into "the most intimate portions of [the suspect's] anatomy" and carry with them the possibility that the suspect will suffer pain or physical harm. *United States* v. *Cameron* 538 F.2d 254, 258 (9th Cir. 1976); see also *United States* v. *Holtz*, 479 F.2d 89, 92-94 (9th Cir. 1973); *Rivas* v. *United States*, 368 F.2d 703, 710 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). The inspection of a suspect's body wastes does not involve an intrusion of this type, and does not threaten harm or pain to the suspect.

Although we strongly disagree with the Ninth Circuit's conclusion that an X-ray search is as intrusive

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intermediate level of suspicion between reasonable suspicion and probable cause, and the Ninth Circuit has been criticized for its approach. See *United States* v. *Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978); *United States* v. *Himmelwright*, 551 F.2d at 995. An intermediate standard is not needed in order to limit the use of body cavity searches to appropriate situations because the scope of a search necessarily is limited by the facts supporting the officer's suspicion. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. at 16-20. Thus, a reasonable suspicion justifying a body cavity search must be supported by facts "which would cause [the Customs] inspectors to reasonably believe that contraband * * * would be revealed in a [body cavity] search." *United States* v. *Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984). Since this requirement is embodied in the reasonable suspicion standard, it results in a "flexible test which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search." *United States* v. *Vega-Barvo*, 729 F.2d at 1344.

as a body cavity search,[21] even the reasons advanced in support of that determination are inapplicable here. The court rested its decision on its view that an X-ray search "goes beyond the passive inspection of body surfaces" and "is potentially harmful to the health of the suspect." *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). In a search of a suspect's body wastes, there is no intrusion of any sort into the suspect's body and no even arguable threat to the suspect's health. Thus, the search contemplated in the present case is no more intrusive than a strip search and therefore should be upheld on the basis of "reasonable suspicion." [22]

c. Apart from the question of the validity of a search of bodily wastes in itself, the decision to undertake this type of search often involves a substantial period of detention, as it did here, because the search cannot take place until after the suspect has eliminated the wastes. As previously noted (pages 20-21, *supra*), it is ordinarily permissible to detain a person for the length of time reasonably necessary to per-

[21] See our brief in opposition in *Vega-Barvo* v. *United States*, *supra*.

[22] The search of a suspect's bowel movements certainly could result in no more indignity than a search involving the removal of an artificial limb, which has been viewed by the courts as the equivalent of a strip search because it lacks the intrusive characteristics of a body cavity search. *United States* v. *Sanders*, 663 F.2d 1, 3 (2d Cir. 1981); *United States* v. *Carter*, 563 F.2d 1360, 1361 (9th Cir. 1977). The *Sanders* court noted that although "the exposure of the stump to which the prosthetic device is attached, accompanied by a temporary lack of mobility, constitutes an embarrassment," the search is "no more intrusive than [a] strip search * * * and clearly less intrusive than a body-cavity search." 663 F.2d at 3 (footnote omitted).

form a lawful search, and, although the detention in cases like this may be lengthier than would be proper in most other contexts, that principle still applies here. In general, the intrusiveness of a border detention of this type is lessened by the substantially reduced liberty expectations of travelers at the border. At the same time, the government's interest is especially strong because of the purpose of the detention. A rule requiring the government to release into the United States persons who are reasonably suspected of smuggling narcotics would directly undermine the government's compelling interest in preventing the importation of contraband.

It is important in assessing the reasonableness of the detention to recognize that this is not a situation in which the length of detention is subject to the unconstrained discretion of the Customs officers. Cf. *Delaware* v. *Prouse*, 440 U.S. 648, 662-663 (1979). The suspect, not the government, controls the length of the detention. Here, respondent apparently engaged in "heroic efforts to resist the usual calls of nature" by refusing all food and water (Pet. App. 4a), in order to thwart a search of her bowel movements. The length of the detention cannot be grounds for transforming a reasonable search into an unreasonable search when the period of detention is extended as a result of the suspect's own efforts.[23] In addition, as the facts of this case demonstrate, a longer period of detention actually serves to reinforce the Customs officers' suspicion that the suspect is an alimentary canal smuggler. A suspect's attempts to impede the very function that, if he is not a smuggler,

[23] A somewhat similar question is before the Court in *United States* v. *Sharpe*, No. 83-529 (argued Nov. 27, 1984).

is the key to his release supplies clear evidence that he has something to hide (see Pet. App. 10a).

Finally, a suspect cannot complain of the intrusiveness of the detention if he selected detention over the alternative of an X-ray search. A reasonable suspicion of alimentary canal smuggling is sufficient to justify an X-ray search as well as detention. An X-ray search involves an invasion of privacy no greater than that attendant to a strip search: there is no physical contact between the searcher and the suspect and no physical intrusion into the suspect's body. X-ray examinations are now a common part of routine physical examinations and, if conducted in accordance with sound medical practice, are not viewed as a health hazard by either the public or the medical profession. See our brief in opposition in *Vega-Barvo* v. *United States*, *supra*, at 7-11.

Thus, when a Customs officer acquires a reasonable suspicion that a traveler is engaged in alimentary canal smuggling, the suspect generally will be faced with a choice between these two search procedures.[24] We have little doubt that most innocent travelers confronted with the choice would elect a prompt X-ray as the means of dispelling suspicion and gaining entry into the country. Be that as it may, the suspect's decision to choose one method over another indicates that, in his view, the method selected is the least objectionable. If the suspect chooses detention over a more expeditious X-ray search, he should not later be heard to complain about the length of the period of detention. For all of these reasons, the reasonable sus-

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[24] In some, relatively rare, situations an X-ray examination might not be appropriate for medical reasons, such as if the suspect were pregnant.

picion standard properly accommodates both the liberty interests and the privacy interests implicated by the detention of a suspected smuggler for the purpose of examining his body wastes.

d. The conclusion of the court below that the detention in this case should be measured against the more stringent "clear indication" standard governing body cavity searches did not rest upon an assessment of the intrusiveness of the detention.[25] The court apparently concluded that the Customs officers' decision to detain respondent was an attempt to circumvent its rule regarding the standard for X-ray searches. It held that because the Customs officers could not perform an X-ray search, they could not detain respondent in order to examine her bowel movements. Pet. App. 6a. Thus, the decision rested upon the Ninth Circuit's rule regarding the intrusiveness of an X-ray search.[26]

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[25] The court did characterize the detention as "long" (Pet. App. 6a) and noted that the detention "impacted both the comfort and the dignity of a human being" (Pet. App. 4a), but it did not relate these observations to its decision to apply the clear indication test in this case.

[26] The court below also noted several times that the Customs officers did not obtain a warrant authorizing either the detention or an X-ray search (see Pet. App. 4a, 5a, 6a, 7a). It stated that " 'the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted.' " Pet. App. 2a n.2, quoting *United States* v. *Cameron*, 538 F.2d 254, 259 (9th Cir. 1976). However, as the court below itself acknowledged (Pet. App. 2a n.2), warrants are not required for border searches. *United States* v. *Ramsey*, 431 U.S. at 619. The Fourth Amendment states that "no warrants shall issue, but upon probable cause * * *," and where, as here, a lesser standard applies, a warrant cannot be required. See *South Dakota* v. *Opperman*, 428 U.S. 364, 370

As we have just discussed, a suspect permitted to choose between two investigative methods may not be heard to complain that the method that he or she selected is more intrusive than the alternative. The Ninth Circuit's approach turns this principle on its head and enables a suspect to complain on the ground that the investigative method that was *not* selected—here, the X-ray search—would have been impermissible under the circumstances. Such a rule is plainly incorrect because a suspect's expectations of privacy cannot be infringed by a search that the government did not conduct; these expectations can be affected only by the search that actually is performed by the government.

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n.5 (1976); Fed. R. Crim. P. 41(c). A warrant requirement would be especially inappropriate in this context because the suspect would have to be detained while the officer obtained the warrant—in this case a process that, when it eventually occurred, appears to have taken about nine hours (see J.A. 40). The detention for this purpose could last as long as the detention necessary to effect the search. See, *e.g.*, *United States* v. *Couch*, 688 F.2d at 601-604; *United States* v. *Ek*, 676 F.2d at 382.

We note that the government can obtain a court order under the All Writs Act, 28 U.S.C. 1651, authorizing medical procedures such as X-ray and body cavity searches. The Customs Service informs us that the hospitals in which these procedures are performed sometimes request that the Service obtain such orders if the suspect refuses to sign a medical consent form. If a court order has been obtained from a neutral and detached magistrate, that fact may sustain the validity of the search (see *United States* v. *Ventresca*, 380 U.S. 102, 106 (1965)) or bar suppression of the evidence (see *United States* v. *Leon*, No. 82-1771 (July 5, 1984)). The Ninth Circuit's approach, by contrast, penalizes the government for failing to obtain a court order, even though a court order is not a prerequisite to a lawful search.

This Court recently applied this principle in addressing the status under the Fourth Amendment of a "canine sniff" of luggage. See *United States* v. *Place*, slip op. 10-11. A sniff test reveals whether a piece of luggage may contain narcotics—information that also could be obtained by an officer's search of the contents of the luggage—but the sniff test "is much less intrusive than a typical search" (*id.* at 10). The Court held that a canine sniff therefore does not constitute a "search" under the Fourth Amendment, despite the fact that the opening of the luggage by an officer obviously would constitute a search (*ibid.*). Similarly, in the present case, the propriety of the detention must be ascertained on the basis of the intrusiveness of that action, not the intrusiveness of a hypothetical X-ray search. As we have shown, the quantum of suspicion required to conduct a strip search is all that is required to permit a detention of the type at issue in this case.[27]

3. The appropriateness of the "reasonable suspicion" standard in this context also is supported by important practical considerations. Illegal drugs increasingly are being imported into the United States

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[27] The above discussion is premised on acceptance of the Ninth Circuit's hypotheses that an X-ray search is properly equated with a body cavity search and that both require more than reasonable suspicion. The burden of our argument is that those propositions, even if correct, do not control the question of the reasonableness of the detention here. We note, however, our disagreement with each of the hypotheses used by the Ninth Circuit to construct its logically fallacious ratio decedendi. For the reasons stated above (page 28, *supra*) and in our brief in opposition in *Vega-Barvo* v. *United States*, *supra*, an X-ray search conducted under proper medical supervision is justified when a Customs officer has a reasonable suspicion that the suspect is carrying contraband.

through the use of alimentary canal smugglers. See *e.g.*, *United States* v. *Mejia*, 720 F.2d at 1382 (importing of cocaine in this manner "is now common"); *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1301 (9th Cir. 1983) (25 alimentary canal smugglers apprehended on a single flight from Colombia).[28] Drug importers have turned to alimentary smuggling because the technique is difficult to detect. Body cavity smuggling, which also has been used to import illegal narcotics into the United States, is characterized by certain external signs, such as an unnaturally stiff gait, restricted body movements, possession of lubricants, objects protruding from body cavities, and the presence of lubricants on undergarments or body orifices. See, *e.g.*, Pet. App. 10a. Alimentary canal smuggling, however, "does not leave the external signs that body cavity (*e.g.*, rectum or vagina) smuggling does." *United States* v. *Mendez-Jimenez*, 709 F.2d at 1303; see also Pet. App. 10a. Thus, it is especially true in this context that "the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." *United States* v. *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring).

[28] The large number of reported appellate decisions relating to this smuggling technique provides graphic evidence of its increasing use. See *United States* v. *Saldarriaga-Marin, supra; United States* v. *Vega-Barvo, supra; United States* v. *Mosquera-Ramirez, supra; United States* v. *Padilla, supra; United States* v. *Pino, supra; United States* v. *Henao-Castano, supra; United States* v. *Castaneda-Castaneda, supra; United States* v. *De Montoya, supra; United States* v. *Caicedo-Guarnizo*, 723 F.2d 1420 (9th Cir. 1984); *United States* v. *Mejia, supra; United States* v. *Castrillon, supra; United States* v. *Gomez-Diaz*, 712 F.2d 949 (5th Cir. 1983), cert. denied, No. 83-5763 (Jan. 9, 1984); *United States* v. *D'Allerman*, 712 F.2d 100 (5th Cir. 1983), cert. denied, No. 83-5359 (Oct. 11, 1983); *United States* v. *Mendez-Jimenez, supra, United States* v. *Quintero-Castro, supra; United States* v. *Couch, supra; United States* v. *Ek, supra.*

The standard adopted by the Ninth Circuit would significantly curtail the ability of Customs officers to apprehend alimentary canal smugglers because this type of smuggling generally is not accompanied by the kind of evidence that court believes is needed to supply a "clear indication" that the suspect is an alimentary canal smuggler. Customs officers generally must rely on "the travelers' inability to explain his or her trip" and other factors that might appear innocent when viewed individually, but which, when viewed in their entirety, reasonably would lead an experienced Customs inspector to suspect the traveler of carrying contraband. *United States* v. *Vega-Barvo*, 729 F.2d at 1351; see also pages 39-41, *infra*. This type of information apparently is insufficient to justify detention under the Ninth Circuit rule because it does not directly indicate the presence of drugs within the suspect's body in the way that lubricants signal the presence of body cavity smuggling. See Pet. App. 6a-7a; *United States* v. *Quintero-Castro*, 705 F.2d at 1100-1101. Thus, persons whom Customs officers reasonably suspect of carrying drugs, such as respondent, could not be subjected to further examination, and would be permitted to enter the United States.

The special problems of detecting this type of narcotics trafficking require a more flexible approach. See *United States* v. *Place*, slip op. 8 & n.5; *Florida* v. *Royer*, 460 U.S. 491, 519 (1983) (Blackmun, J., dissenting). In light of the absence of alternative methods for detecting alimentary canal smugglers

(see page 17 note 9, *supra*),[29] and the relatively minor intrusion associated with this investigative technique, this Court should uphold detentions for this purpose on the basis of reasonable suspicion. As the dissenting judge below warned, "[t]o deny the validity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders." Pet. App. 12a.

4. Even if the Court does not agree with our contention that the reasonable suspicion standard should govern border detentions of the type at issue in this case, we submit that the government may detain at the border aliens seeking to enter the United States—as opposed to returning citizens—who are suspected of smuggling narcotics.

A person seeking to invoke the protection of the Fourth Amendment must show that "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy [or liberty]' * * * has been invaded by government action." *Smith* v. *Maryland*, 442 U.S. at 740. The inquiry is whether the individual has a subjective expectation of privacy or liberty "that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. at 361 (Harlan, J., concurring); see also *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7; *Smith* v. *Maryland*, 442 U.S. at 740-741. The statutes governing the admission of aliens into this country strictly limit aliens' expectations of privacy and liberty prior to entry into the United States. Since the detention of an alien in order to determine

[29] This is especially true in the Ninth Circuit, where Customs officers also cannot utilize X-ray searches in the absence of a "clear indication" of alimentary canal smuggling.

whether he or she is carrying narcotics does not infringe upon the privacy or liberty that the alien legitimately could expect under these statutes, such a detention does not violate the Fourth Amendment.

An alien can be excluded from admission into the United States on a variety of grounds (see, *e.g.*, 8 U.S.C. 1182), and Congress has directed that "[e]very alien * * * who may not appear to the examining immigration officer * * * to be clearly and beyond a doubt entitled to [enter] shall be detained for further inquiry * * *" (8 U.S.C. 1225(b)).[30] In view of this broad detention requirement, and travelers' general awareness that delays may accompany efforts to enter a foreign country, an alien seeking admission into the United States has a drastically limited expectation of liberty. Moreover, since an alien must be excluded from this country if immigration officials "know or have reason to believe [that the alien] is * * * an illicit trafficker in [narcotics]" (8 U.S.C. 1182(a)(23)), aliens such as respondent are on notice that they will be refused entry unless it appears clearly and beyond a doubt that they are *not* carrying narcotics.

In addition, 8 U.S.C. 1222 provides:

> For the purpose of determining whether aliens * * * arriving at ports of the United States be-

[30] This Court's decisions make clear that the Legislative and Executive Branches have plenary authority over immigration matters and that the Constitution does not limit the authority to detain aliens at the border pursuant to these statutes. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). We discuss this issue in our brief in *Jean* v. *Nelson*, No. 84-5240, at 25-35. A copy of that brief is being furnished to counsel for respondent.

> long to any of the classes excluded by this chapter, by reason of being afflicted with any of the diseases or mental or physical defects or disabilities set forth in section 1182(a) of this title * * * such aliens shall be detained * * * for a sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not they belong to the excluded classes.

While it is not clear whether this statute specifically contemplates detention and a medical examination for the purpose of determining whether the alien has ingested illicit drugs and is therefore excludable under Section 1182(a)(23), it is quite plain that being examined while undressed, being X-rayed, having urine or feces inspected, and having body cavities examined are all routine medical procedures to which aliens (but not citizens) may be subjected to determine their medical fitness to enter the country. See 8 C.F.R. 234.1; 42 C.F.R. 34.4.

These statutes make plain that society is not willing to accord aliens at the border the rights of privacy and liberty enjoyed by persons inside the United States. Aliens can reasonably have only a drastically limited expectation that they will be free from detention and from searches effected through medical procedures. When the government's compelling interest in preventing the importation of contraband is weighed against these limited expectations of privacy and liberty, it seems clear that even a quantum of suspicion less than reasonable suspicion should suffice to justify the detention and search of an alien at the border.

This result is especially appropriate here. Respondent could not have had any reasonable expectation of liberty because she was subject to detention under the immigration statutes. She plainly was not "clearly and beyond a doubt" entitled to enter the United States because the Customs officers had a substantial suspicion that she was carrying narcotics (see pages 41-42, *infra*), a circumstance that would render her excludable under Section 1182(a)(23). Since the detention of respondent was authorized under Section 1225(b), she could not reasonably expect that she would be free to enter the United States. Her detention therefore did not violate the Fourth Amendment.

B. The Detention Of Respondent Was Lawful Because The Customs Officers Reasonably Suspected That She Was Engaged In Alimentary Canal Smuggling

The "reasonable suspicion" test is satisfied if Customs officers "are aware of specific articulable facts [that], together with rational inferences from those facts," reasonably warrant a suspicion that a person seeking to enter the country is carrying contraband. *United States* v. *Brignoni-Ponce*, 422 U.S. at 884; see also *United States* v. *Cortez*, 449 U.S. 411, 416 (1981). The district court held in the present case that the officers "were justified in having a very substantial suspicion that [respondent] may very well [have been] bringing in cocaine" (Pet. App. 14a). The court of appeals similarly concluded that "the officers had a strong suspicion that [respondent] was carrying drugs in her body" (*id.* at 4a; see also *id.* at 5a). In light of these concurrent findings of fact, this Court need not address this factual issue. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623

(1982) (collecting cases).[31] In any event, it is clear that the facts known to the Customs officers in the present case were more than sufficient to warrant the suspicion that respondent was attempting to smuggle narcotics into the United States.

The existence of reasonable suspicion must be determined on the basis of "an assessment of the whole picture" as viewed by "those versed in the field of law enforcement." *United States* v. *Cortez*, 449 U.S. at 418. This Court has emphasized that "objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion." *Id.* at 419; see also *United States* v. *Brignoni-Ponce*, 422 U.S. at 885. It is clear that "[a]mong the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices." *United States* v. *Mendenhall*, 446 U.S. at 563-564 (Powell, J., concurring); see also *Florida* v. *Royer*, 460 U.S. at 524-526 nn. 5 & 6 (Rehnquist, J., dissenting).

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[31] In neither court below did respondent dispute that the facts known to the Customs officers satisfied the reasonable suspicion standard. She maintained only that they did not meet the clear indication standard necessary to permit an X-ray search and did not constitute probable cause, which she contended was necessary to authorize her detention. See E.R. 20-24; J.A. 11, 30-32; C.A. Br. 15, 18, 20. It was not until respondent filed her opposition to the petition for a writ of certiorari that she asserted that the facts known to the Customs officers at the inception of the detention failed to satisfy the reasonable suspicion standard. In our view, however, the information should have been held to satisfy even the clear indication standard, if not to amount to probable cause (see page 42, *infra*).

The Customs Service has learned through the experience of officers in the field that several facts reliably indicate that a suspect may be engaged in alimentary canal smuggling. These smugglers tend to be travelers from narcotics source countries who may previously have made a number of short trips to the United States. In addition, they generally have no hotel reservations and know no one in the United States. They may carry large amounts of American currency but do not have the amount of luggage and clothing that, in Customs officers' experience, is characteristic of a typical legitimate traveler. Finally, the suspects usually are not aware of the manner in which their airline tickets were purchased. See *United States* v. *Vega-Barvo*, 729 F.2d at 1350 (noting that the defendant was a South American traveling alone, had arrived from a drug source country, and was carrying a single piece of luggage); *United States* v. *Pino*, 729 F.2d 1357, 1358 (11th Cir. 1984) (the defendant, a Colombian, had only enough luggage for a short stay, and explained that his ticket had been purchased for him by another person); *United States* v. *Henao-Castano*, 729 F.2d 1364, 1365 (11th Cir. 1984), petition for cert. pending, No. 84-5554 (the defendant was a Colombian, could not explain the circumstances of the purchase of his ticket, planned to stay in a hotel but had made no reservations, and carried only one suitcase containing a small amount of clothing); *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984) (the defendant was a Colombian, carried little luggage or clothing, and could not say how much his ticket cost); *United States* v. *Mejia*, 720 F.2d at 1380 (defendant carried $2,000 in cash, had traveled to the United

States twice in the last 14 months, and had no hotel reservations).[32]

Another important factor indicating that smuggling is afoot is "the traveler's inability to explain his or her trip" or the recital of an implausible story concerning the purpose of the journey. *United States* v. *Vega-Barvo*, 729 F.2d at 1350 (defendant's story that she was a travel agent not credible in light of indications that she lacked an education and had made no concrete business arrangements). See also *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1354-1355 (defendant's claim that he had come to this country to purchase Betamax machines substantially weakened by lack of an explanation of how he intended to buy the merchandise with the funds at his disposal); *United States* v. *Pino*, 729 F.2d at 1359 (reasonable suspicion established by fact that, although defendant claimed to be in the television repair business, he knew nothing about television parts); *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1364 (11th Cir. 1984), petition for cert. pending, No. 84-5556 (defendant's claim that he was in the ceramics business impeached by the fact that he had only a superficial knowledge of basic business matters); *United States* v. *Henao-Castano*, 729 F.2d at 1365-1366 (defendant's statement that he was in the country to purchase electronic devices for his store undercut by his lack of a planned itinerary or knowledge concerning the business); *United States* v. *Padilla*, 729 F.2d at 1368 (reasonable suspicion established, inter alia, because defendant, who claimed

[32] Special Agent Windes explained in his affidavit in support of the application for the court order that a lack of luggage and other personal belongings "indicat[es] a 'stripped down' or 'clean' approach typical of professional couriers" (J.A. 42).

to be visiting country to purchase business machines, told an implausible story about the items he hoped to purchase and lacked a realistic plan as to how to transport these items); *United States* v. *Mejia*, 720 F.2d at 1380 (defendant claimed to be on a buying trip but did not have appropriate business dress).

As the court of appeals acknowledged, respondent "possessed almost all of the indicators" used to identify drug couriers (Pet. App. 3a n.3). She was traveling from Colombia, a source country for narcotics, on a trip of short duration, and previously had made numerous short trips to Miami and Los Angeles. Respondent had no family or friends in the United States and no confirmed hotel reservation, carried $5,000 in cash, and could not recall where she had purchased her airline ticket. Pet. App. 2a n.3; J.A. 41-42, 46, 62; E.R. 40.

Respondent explained that the purpose of her trip was to purchase clothing and electrical appliances for her husband's retail business in Colombia, and to support that claim she exhibited business cards and a book of invoices (J.A. 14-15). Although this story initially may have had a patina of credibility, its plausibility was seriously eroded upon further questioning by the Customs officers. Thus, although respondent supposedly had traveled several thousand miles at substantial cost for this purpose, she admitted that she had no concrete plan for purchasing these items other than visiting various retail merchants by taxicab (J.A. 62; E.R. 40). Indeed, respondent's statements closely paralleled the claims of other alimentary canal smugglers who have posed as buyers for retail stores. See pages 40-41, *supra*.

The unusual arrangement of undergarments worn by respondent—two pairs of elastic underpants together with a paper towel in her crotch (J.A. 57, 62-63)—provided further support for the officers' sus-

picion that respondent was engaged in smuggling. This multi-layered barrier is indicative of an effort to prevent discovery of any premature release of the items concealed in respondent's digestive tract.

These facts far surpass the minimum showing required to establish a reasonable suspicion that respondent was engaged in smuggling. Even if some intermediate level of suspicion greater than reasonable suspicion were necessary to uphold the detention, the evidence of the undergarments combined with the key characteristics of alimentary canal smuggling exhibited by respondent in fact provided a "clear indication" that contraband would be discovered in respondent's bowel movements. Indeed, we think these facts supply the showing of a "probability or substantial chance of criminal activity" required to meet the standard of probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 244 n.13 (1983); see also *id.* at 235; Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois *v.* Gates, 17 U. Mich. J.L. Ref. 465, 476-478, 495-501 (1984). The Customs officers therefore were justified in detaining respondent in order to determine whether she was engaged in smuggling.[33]

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[33] The court of appeals did not question that respondent's behavior while she was detained—her failure to eat, drink, or use the bathroom and symptoms of discomfort indicating "heroic efforts to resist the usual calls of nature" (Pet. App. 4a)—in combination with the evidence discussed above, supplied the "clear indication" of alimentary canal smuggling required for a body cavity search in the Ninth Circuit. Therefore, the rectal search that revealed the balloon filled with cocaine was proper under the Fourth Amendment, and the evidence is subject to suppression only if it can properly be held a fruit of an illegal detention.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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